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No. 91-547

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

KOREAN AIR LINES, LTD.,

Cross-Petitioner,

—v.—

PHILOMENA DOOLEY, et al.,

Cross-Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

CROSS-RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether the district court abused its discretion in admitting in evidence the official accident report and committed substantial prejudicial error requiring a new trial?

Whether there was sufficient evidence to support the jury's liability verdict?

PARTIES TO THE PROCEEDING BELOW

Cross-Respondents are listed at page ii of their Petition for Writ of Certiorari, No. 91-251.

Cross-Petitioner is Korean Air Lines, Ltd.

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CROSS-RESPONDENTS' BRIEF IN OPPOSITION

Cross-Respondents Philomena Dooley, et al., respectfully pray that the cross-petition for certiorari filed in these cases on behalf of Korean Air Lines, Inc. (KAL) be denied.¹

STATEMENT OF THE CASE

Cross-Respondents are the surviving family members and estate representatives of one hundred thirty-seven passengers killed in the KAL flight 7 disaster of September 1, 1983. While flying in the airspace of the U.S.S.R. near Sakhalin

¹ References to the Appendix to the Cross-Petition appear as "Cross-Pet. at ____a." References to the Appendix hereto appear as "App. at ____a."

Island, and over three hundred miles off course, KAL 7 was fired upon by a Soviet military fighter and crashed, killing all aboard.

KAL 7 was a regularly scheduled passenger flight from New York's Kennedy Airport to Seoul, South Korea with a refueling stop and crew change in Anchorage, Alaska. *In re Korean Air Lines Disaster*, 932 F.2d 1475, 1477 (D.C.Cir. 1991); Cross-Pet. at 3a.

On the flight's second leg, KAL 7's three pilots were required to fly the plane from Anchorage directly to and over BETHEL, a mainland based navigation transmitter 360 miles west of Anchorage. From BETHEL, KAL 7's pilots were required to avoid Soviet airspace by flying international Route R20 over the northern Pacific Ocean on a straight line path between fixed geographical waypoints NABIE, NUKKS, NEEVA, NINNO, NIPPI, NYTIM and NOKKA.² 932 F.2d at 1477, 1500; Cross-Pet. at 3a, 50a, 92a.

The danger of flying in Soviet airspace was well known to KAL and its flight crews by virtue of specific training, warnings and prior Soviet attacks. In 1978, KAL flight 902 from Paris to Anchorage was flown off course and shot down over the Soviet Union, killing and injuring fourteen passengers. 932 F.2d at 1478; Cross-Pet. at 6a.

Flight 7 used a Boeing 747 aircraft equipped with numerous navigational devices which continuously informed the pilots of their exact position. *In re Korean Air Lines Disaster*, 704 F.Supp. 1135, 1137 (D.D.C. 1988). Included were three autonomous inertial navigation system (INS) computers, two weather radar units with ground mapping fea-

2 KAL 7's pilots were required by International Civil Aviation Organization (ICAO) Rules of the Air to fly on the centerline of Route R20 directly between each waypoint. Moreover, ICAO regulations required KAL 7's crew to radio position reports to air traffic control when the plane passed directly over BETHEL, NABIE, NEEVA, NIPPI and NOKKA. If the plane deviated from course at any time, the pilots were required to promptly report their actual position. Convention on International Civil Aviation, Dec. 7, 1944, Annex 2 (7th ed. 1981), 61 Stat. 1180, T.I.A.S. No. 1591, 15 U.N.T.S. 295.

tures, five compasses and six navigational radios and receivers. ICAO Report at 10-14.³ Each of the three pilots was properly trained and had responsibilities to ensure the safe navigation of the aircraft. 704 F.Supp. at 1142-44.

KAL 7's pilots missed BETHEL and each successive waypoint of Route R20 by increasing distances, flying the plane off course on a short-cut route to Seoul for over five hours, including three hours in Soviet airspace and over its territory. ICAO Report at 1, 55; App. at 5a, 8a, 10a.

Two airline captains with extensive experience flying the North Pacific routes for major international carriers appeared at trial. They testified that KAL 7's pilots had to know they were flying the plane off course and concealed their deviation by a series of false position reports to air traffic controllers. App. at 4-5a, 7a, 10-11a. KAL 7's pilots probably misprogrammed the INS on the ground in Anchorage and recognized their error no later than several minutes after takeoff. App. at 8-9a, 13a. But the KAL pilots failed to return to the airport as required in order to correct their error and recklessly flew the plane off course for hours using the misprogrammed INS. App. at 2-3a, 5a, 9-10a.

The ICAO Investigation and Final Report

The International Civil Aviation Organization (ICAO) is part of the United Nations. Among various duties, ICAO promulgates the Rules of the Air which regulate the navigation of international flights. Convention on International Civil Aviation, *supra* note 2.

On September 16, 1983, the ICAO Council adopted a resolution directing ICAO's Secretary General "to institute an investigation to determine the facts and technical aspects of the [KAL 7] incident and to provide a final report thereon to the Council. . . ." ICAO Report at 1. On December 2, 1983, the Secretary General filed the "Final Report of Inves-

³ ICAO Secretary General's Report on the Destruction of KAL B-747 on 1 Sept. 1983 (Dec. 1983). For convenience of reference, this report is referred to herein and in the courts below as the ICAO Report.

tigation." The Report was final once issued. There was no requirement that the Final Report be "endorsed" by the Council or anyone else. ICAO Report at 1.

The United States representative stated that "the ICAO Secretary General's report has provided us with an impartial, meticulously researched explanation of what happened to KAL flight 7."⁴ Likewise, the Canadian representative observed: "I am pleased to state that Canada's aviation safety experts have carefully analyzed and given their endorsement to the ICAO Final Report." 1984 Minutes, *supra* note 4, at 40.

The Korean Observer approved the Final Report as a "monument of ICAO professionalism, independence and integrity." 1984 Minutes, *supra* note 4, at 27. Indeed, KAL's President stated the Final Report was "reliable," "objective" and "most authoritative."⁵

The official investigation was promptly commenced by ICAO's Secretary General who assembled a team of international experts in communications, accident reconstruction, air traffic control and operations.⁶ All interested governments, including the United States and South Korea, deferred to the ICAO investigation.

ICAO was assisted by aviation specialists from KAL; the United States Federal Aviation Administration (FAA) and National Transportation Safety Board; government aviation agencies of Japan and South Korea; Litton, the manufacturer of the KAL 7's navigational computers; Boeing, the manu-

4 Minutes of ICAO Council, 111th Sess., Montreal, 1 Feb.-30 Mar. 1984, Doc. 9441-C/1081, C-Min 111/1-18 [1984 Minutes] at 38.

5 Transcript of meeting between KAL's representatives and Association of Families of Japanese Victims, in Tokyo, Japan p. 8 (May 11, 1984) (Exhibit 283 for identification).

6 Minutes of ICAO Council, 110th Sess., Montreal, 14 Oct.-16 Dec. 1983, Doc. 9427-C/1078, C-Min./1-20 [1983 Minutes] at 148; ICAO Report at 1-2.

facturer of KAL 7; and major airlines flying the North Pacific routes.⁷ ICAO Report at 2.

ICAO's investigators visited Japan, Korea, the Soviet Union, the United States and search vessels in the Sea of Japan. They obtained documents and information from numerous independent sources. Flight simulations were conducted at the Boeing Aircraft facilities in Seattle, Washington with numerous aviation experts in attendance, including KAL's Chief of Training. ICAO Report at 2, 44-54; *supra* note 7.

The ICAO Final Report found KAL 7 began to deviate from course ten minutes after takeoff from Anchorage, passed twelve miles north of BETHEL and continued off course for over five hours until it crashed. After leaving Alaska, KAL 7 flew towards Soviet airspace and above the Kamchatka Peninsula and Sakhalin Island. ICAO Report at 1, 5, 55.

ICAO considered various explanations for the deviation and concluded that the flight path was consistent with errors made by KAL 7's pilots in programming the plane's INS computers while on the ground at Anchorage. Using a Boeing 747 flight simulator, ICAO's investigators thoroughly analyzed how the 747 aircraft could have been flown from Anchorage to the place of shootdown over the Sea of Japan given the known times, distance, airspeed and wind conditions. ICAO Report at 42-54.

ICAO obtained substantial evidence from numerous reliable sources, wholly independent of the Soviet Union, which showed KAL 7 off course within minutes of takeoff from Anchorage through the remainder of the flight. United States FAA and Air Force radar tracked the plane flying off course over Alaska, missing its first required checkpoint (BETHEL)

7 Participants, KAL 007 Incident Simulation (Nov. 16-18, 1983) (Exhibit 199 for identification).

by twelve miles, six times the maximum allowable deviation.⁸ ICAO Report at 5. The United States FAA also supplied information that KAL 7 was flown many miles north of two oceanic checkpoints (NABIE and NEEVA) because KAL 7 was unable to communicate directly with air traffic control.⁹ ICAO Report at 37-38, C-4, C-5. KAL 7's wind reports, when compared to the actual weather conditions, showed that the plane was flown two hundred miles off course over the Soviet Kamchatka Peninsula.¹⁰ ICAO Report at 37.

Japanese defense radar overlapped the Soviet radar coverage for the last twenty minutes of KAL 7's flight and showed the plane proceeding about three hundred miles off course through Soviet airspace over the Sea of Okhotsk, Sakhalin Island and the Sea of Japan, where it disappeared. Wreckage was found in the Sea of Japan and the main wreckage location southwest of Sakhalin Island was approximated by signals received from KAL 7's flight recorder. ICAO Report at 28, 42.

ICAO also received the transcript of the Soviet fighter pilot's radio communications which pinpointed the time of the attack (five hours and twenty-six minutes after takeoff). ICAO Report at D-2. That time was confirmed by a distress message sent by KAL 7. ICAO Report at C-10.

8 KAL 7's pilots were required to fly directly over or within two miles of BETHEL. App. at 3a, 7a. That was necessary not only to comply with air traffic control instructions, but to confirm that the plane's INS units were functioning properly. 704 F.Supp. at 1141-42.

9 ICAO found that if over checkpoints NABIE and NEEVA, KAL 7's pilots should have been able to communicate directly with air traffic control through ground based radio stations in the Aleutian Islands. Instead, KAL 7 relayed its position reports through another KAL aircraft. ICAO Report at 37-38.

10 ICAO's investigation team concluded that the winds reported by KAL 7's pilots for NIPPI were "inconsistent with the windfield along route R20, such a wind direction being more in keeping with a position at least 200 NM [nautical miles] north-northwest of NIPPI." ICAO Report at 37. That location is directly over the Kamchatka Peninsula.

Soviet radar information showed KAL 7 flying for over two hours, and 200 to more than 300 miles off course over the Kamchatka Peninsula, the Sea of Okhotsk and Sakhalin Island. ICAO Report at 46, F-17; Cross-Pet. at 82-83a.

The United States government declared on the day of the disaster that KAL 7 was tracked by the Soviet military radar for two and a half hours and proceeded for many miles in Soviet airspace over Kamchatka, the Sea of Okhotsk and Sakhalin.¹¹ 932 F.2d at 1483; Cross-Pet. at 14a; ICAO Report at 40; BUREAU OF PUBLIC AFFAIRS, U. S. DEP'T OF STATE, BULLETIN REPRINT, KAL FLIGHT #007: COMPILATION OF STATEMENTS AND DOCUMENTS, SEPTEMBER 1-16, 1983, (Oct. 1983) (Exhibit 205 for identification).

Internal documents of KAL and its insurer prepared shortly after the disaster acknowledged that KAL 7 entered "USSR airspace some considerable distance to the right hand side of its planned flight track" over Kamchatka, the Sea of Okhotsk and Sakhalin.¹² In answering plaintiffs' complaints, KAL formally admitted that KAL 7 was "shot down over the Sea of Japan", a location over 300 miles away from the plane's required course.¹³

KAL admitted the Final Report's trustworthiness. In 1984, KAL's President stated that the Final Report was "reliable," "objective" and "most authoritative." KAL's President

11 While the United States and many other nations sharply disputed Soviet claims that the attack was justified, the fact that KAL 7 was flown off course over five hours, including three hours in Soviet airspace, was uniformly accepted. 932 F.2d at 1483; Cross-Pet. at 14a.

12 Airclaims (Far East) Sdn. Bhd., Proof of Loss Report p. 3 (Sept. 20, 1983) (Exhibit 94 for identification); KAL's Estimated Flight Path of KAL 7 Between ANC and SEL (Exhibit 62 for identification).

13 KAL's counsel argued below that the plane was on course until waypoint NIPPI and then suddenly made a right turn and flew directly towards the Sea of Japan for eighty minutes, across the Soviet Kuril and Sakhalin Islands. 932 F.2d at 1479, 1481; Cross-Pet. at 8a, 10a. It was physically impossible, however, for KAL 7 to fly from NIPPI to the Sea of Japan by the known time of the Soviet attack. App. at 15-16a.

stated that his comments were based on KAL's participation in the ICAO investigation, *supra* note 5.

In the district court, KAL did not provide a single witness or document to dispute the Final Report's trustworthiness. Ten KAL officers and employees actively participated in the ICAO investigation. *Supra* note 5. None of these persons were called by KAL. KAL also did not call any of its pilots or an independent pilot expert to challenge the Final Report. Instead, KAL's counsel merely argued that the Final Report was untrustworthy because ICAO included in its Report Soviet radar information.

The only witness called by KAL regarding the Report was James Nelson, U.S. ICAO representative. He reviewed a draft of the Final Report and made only two minor corrections to the text, accepted the Japanese radar track and concluded that KAL 7 was shot down miles off course near Sakhalin Island. App. at 16-18a. The ICAO Council instructed the Air Navigation Commission (ANC) to review the Report and determine whether revisions were needed in ICAO's Rules of the Air. 1983 Minutes, *supra* note 6. The ANC's February 1984 report confirmed that there was a "significant deviation from track[,] [t]he magnitude of [which] cannot be explained." 704 F.Supp. at 1138 n.9. No changes to the Rules of the Air were suggested. 1984 Minutes, *supra* note 4, at 19.

In March 1984, the Council "completed its action on . . . the Final Report. . . ." by adopting a resolution which recognized the Final Report's findings of KAL 7's "serious deviation of some 500 kilometers from its flight plan". 1984 Minutes, *supra* note 4, at 105-06, (emphasis in original).

The Opinions Below

The district court ruled that the complete ICAO Final Report was trustworthy and thus admissible under Fed.R.Evid. 803(8)(C). Cross-Pet. at 52-89a. An extensive written record of testimony from ICAO participants and numerous documents was submitted by the parties prior to

trial. The trial court recognized the ICAO team's independence and expertise. Cross-Pet. at 70a. In addition, the district court conducted a detailed review of the numerous sources of information obtained by the investigators. Cross-Pet. at 70a-75a. The trial court concluded that KAL's objection "has nothing to do . . . with trustworthiness . . ." but went to the "value" and "weight" of the Report. Cross-Pet. at 86a.

Following the jury's special verdict finding of wilful misconduct and proximate cause, the trial court denied KAL's motions for a new trial or judgment notwithstanding the verdict. 932 F.2d at 1479; Cross-Pet. at 6a. The district court had previously denied KAL's pre-trial motion for summary judgment. 704 F.Supp. at 1135.

The circuit court unanimously upheld the jury's liability verdict as supported by sufficient evidence. 932 F.2d at 1475; Cross-Pet. at 2a. The circuit court also unanimously affirmed the district court's ruling on the ICAO Report as a proper exercise of discretion. 932 F.2d at 1482-83; Cross-Pet. at 13-15a. The appellate court observed that "this is precisely the sort of judgment call by the trial judge that is entitled to deference on appeal . . ." 932 F.2d at 1483; Cross-Pet. at 15-a.

REASONS FOR DENYING THE WRIT

I

THIS IS AN EVIDENTIARY FACTUAL MATTER INVOLVING JUDICIAL DISCRETION AND THERE IS NO CONFLICT AMONG THE CIRCUITS

The airline's cross-petition involves a mere evidentiary determination made by a district court in the exercise of its discretion and affirmed by a unanimous circuit court. Contrary to KAL's claims, there is no conflict among circuit courts.

Indeed, the legal principles governing the evidentiary-discretionary decision below were recently settled in *Beech*

Aircraft v. Rainey, 488 U.S. 153 (1988), and followed by both courts below. *Rainey* unanimously approved the “broad approach to admissibility” of factual findings in aircraft accident reports under F.R.E. 803(8)(C), subject to the district court’s discretion to bar untrustworthy findings. *Id.* at 169-70. This Court reasoned that “the admission of a report containing ‘conclusions’ is subject to the ultimate safeguard—the opponent’s right to present evidence tending to contradict or diminish the weight of those conclusions.” *Id.* at 168.

Rainey has been uniformly applied by circuit courts in allowing a wide variety of reports, including accident reports, in evidence. *Moss v. Ole South Real Estate*, 933 F.2d 1300, 1305-08 (5th Cir. 1991) (government reports regarding racial discrimination); *Lubanski v. Coleco Industries*, 929 F.2d 42, 45 (1st Cir. 1991) (state police report concerning car accident); *Gentile v. County of Suffolk*, 926 F.2d 142, 147 (2d Cir. 1991) (state commission report on investigation of police department); *O’Dell v. Hercules, Inc.*, 904 F.2d 1194, 1204 (8th Cir. 1990) (Center for Disease Control study and state environmental agency technical summary of chemical sites); *Puerto Rico Ports Authority v. N/V Manhattan Prince*, 897 F.2d 1, 5 (1st Cir. 1990) (Coast Guard accident report); *In re Aircrash in Bali, Indonesia*, 871 F.2d 812, 816 (9th Cir. 1989) (Federal Aviation Administration report concerning airline’s safety record).

Pursuant to *Rainey*’s dictate, courts have held that the trustworthiness determination under F.R.E. 803(8)(C) is within the district court’s broad discretion and that the party opposing admission has the burden of proof. *Rainey*, 488 U.S. at 167-70; *Moss v. Ole South Real Estate*, 933 F.2d at 1305 (“the party opposing admission of the report must prove the report’s untrustworthiness.”); *Lubanski v. Coleco Industries*, 929 F.2d at 45-46 (“district courts have broad discretion” under F.R.E. 803(8)(C) and “report was . . . deserving of an initial presumption of admissibility”); *In re Aircrash in Bali, Indonesia*, 871 F.2d at 816 (“trial court has broad discretion to admit or exclude evidence” under Rule 803(8)(C)).

Courts have consistently recognized a series of factors which may be considered by the trial court in resolving trustworthiness. These factors include, but are not limited to the timeliness of the investigation, the investigator's skill or experience, whether a hearing was held, possible bias in preparation of the report, the finality of the findings and the extent to which the report is based on hearsay. *Rainey*, 488 U.S. at 168 n.11; *Gentile v. County of Suffolk*, 926 F.2d at 151; *Baker v. Elcona Homes*, 588 F.2d 551, 558 (6th Cir. 1978).

KAL claims that circuit courts conflict over how trustworthiness is defined. Cross-Pet. at 13, 17-20, 21. The cases cited by KAL, however, are not in conflict, but simply found various reports untrustworthy under the particular facts presented. *Faries v. Atlas Truck Body*, 797 F.2d 619 (8th Cir. 1986) (excluded report of state trooper who failed to take important measurements at accident scene and interviewed only one witness, an interested party); *Bright v. Firestone Tire*, 756 F.2d 19, 22 (6th Cir. 1984) (excluded report of House subcommittee on tire safety record "based on hearsay regarding lawsuits and customer complaints without any investigation into the ground for those complaints."); *City of New York v. Pullman Inc.*, 662 F.2d 910, 914-15 (2d Cir. 1981) (excluded interim report of House subcommittee which contained "the tentative results of an incomplete staff investigation"); *McKinnon v. Skil Corporation*, 638 F.2d 270 (1st Cir. 1981) (excluded Consumer Product Safety Commission reports which mainly consisted of "a paraphrasing of versions of accidents given by the victims themselves . . ."); *McShain v. Cessna Aircraft*, 563 F.2d 632 (3d Cir. 1977) ("trial court did not abuse its discretion in refusing to admit" thirty National Transportation Safety Board reports regarding prior accidents which contained numerous hearsay statements of pilots and other witnesses).

KAL's Cross-Petition confirms that each case turns on its own facts and that trial judges have broad discretion to exclude or admit reports. The district court ascertains which trustworthiness factors are relevant under the circumstances. The circuit court reviews the district court regarding an abuse

of discretion. Thus, there is no conflict for this Court to resolve.

II

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE ICAO REPORT

The trial court was amply justified in finding the entire ICAO report trustworthy. It was prepared by the Secretary General of ICAO, a part of the United Nations, assisted by experts from the international aviation community, including Korea, the United States and Japan. KAL actively participated. The investigation was timely, impartial, detailed and comprehensive. The ICAO Report was final and the investigation closed. *Supra* pp. 3-8.

The ICAO investigators analyzed and compared all available information. This included radar data of KAL 7 from the United States, the U.S.S.R. and Japan; radio communications concerning KAL 7 and aircraft flying the North Pacific routes that evening; the actual weather conditions over the North Pacific and Soviet Union; the Soviet fighter pilot's radio communications; and the approximate wreckage location. Using Boeing's flight simulator, detailed simulations were conducted which considered the known facts together with the characteristics of the 747 aircraft. *Supra* pp. 4-7.

All of the information and ICAO's own analysis were consistent and supported the Report's conclusion that KAL 7's pilots flew the plane off course for over five hours, including three hours in Soviet airspace.

The reliability of the ICAO Report, including Soviet radar information, was supported by other proof. KAL admitted that its flight 7 was substantially off course and flew through Soviet airspace. KAL's President conceded that the Report was "reliable" and "authoritative". And the United States confirmed that Soviet radar tracked KAL 7 for hours in Soviet airspace. *Supra* pp. 4, 7-8.

An extensive record was submitted *in limine* to the trial court. It carefully reviewed the sources of information considered by the ICAO investigators in finding that the Report was trustworthy and admissible. Cross-Pet. at 70-75a.

As the Court of Appeals found, the district court had discretion to admit the ICAO Report with the Soviet radar information. 932 F.2d at 1482-83; Cross-Pet. at 13-15a; *Federal Aviation Administration v. Landy*, 705 F.2d 624, 633 (2d Cir. 1983) ("[A]s a statement by a foreign government to the federal government, incorporated in the FAA's factual findings resulting from an investigation made pursuant to authority granted by law, the telex was admissible as public record under Fed. R. Evid. 803(8)(B), (C)"). Moreover, as the Court of Appeals found below, "the radar track . . . was generally believed by several sources, including the United States government. . . ." 932 F.2d at 1483; Cross-Pet. at 14-a.

Both the district court and Court of Appeals observed that KAL's arguments regarding the Report addressed a fact issue for the jury, rather than trustworthiness. 932 F.2d at 1483; Cross-Pet. at 14a, 86a. The Second and Fifth Circuits recently agreed. *Moss v. Ole South Real Estate*, 933 F.2d at 1304 ("credibility is not the focus of the trustworthiness inquiry"); *Gentile v. County of Suffolk*, 926 F.2d at 149 ("defendants fail to distinguish between a trustworthiness determination, which is made by the trial court . . . and a credibility determination, which is made by the trier of fact to decide exactly what weight to accord to evidence that has been admitted").

During trial, KAL had ample opportunity to present evidence to question the Report's reliability, but did not do so. Although KAL named pilot and air traffic control experts as trial witnesses, none were called. KAL also did not call any of its own pilots or technical employees. And KAL failed to present evidence explaining flight from Anchorage to the Sea of Japan absent a lengthy deviation through Soviet airspace.

III

**THE LIABILITY VERDICT WAS SUPPORTED
BY SUBSTANTIAL EVIDENCE**

KAL 7's pilots committed egregious misconduct by violating their flight clearance, intentionally flying hundreds of miles off course into dangerous airspace for many hours and falsifying position reports to conceal their deviation rather than admitting their error, returning to Alaska or seeking assistance.

Numerous appellate decisions applying the Warsaw Convention support and are consistent with the KAL liability verdict below. France's highest court affirmed a wilful misconduct finding against KAL involving a passenger killed on KAL flight 902, which violated Soviet airspace in 1978 and was shot down. *Korean Airlines v. Entiope*, Dec. 15, 1981, Cour de Cassation, Jur. 215. Another wilful misconduct verdict against KAL was affirmed by the Alaskan Supreme Court in *Korean Air Lines v. State of Alaska*, 779 P.2d 333 (Alaska 1989), where a KAL crew took off on the wrong runway and crashed into another aircraft after giving controllers a false position report and failing to monitor the plane's compasses or a map while taxiing.

A series of circuit court decisions have upheld wilful misconduct findings. *Butler v. Aeromexico*, 774 F.2d 429 (11th Cir. 1985) (pilots deliberately continued a landing in poor weather rather than execute a missed approach); *LeRoy v. Sabena Belgian World Airlines*, 344 F.2d 266, 271 (2d Cir. 1966) (flight crew gave a false position report to air traffic controllers); *KLM v. Tuller*, 292 F.2d 775 (D.C.Cir. 1961) (Burger, J.) (crew failed to send a distress message just prior to crash followed by several rescue errors); *American Airlines v. Ulen*, 186 F.2d 529, 533 (D.C.Cir. 1949) (pilots flew according to a flight plan which failed to provide the minimum obstacle clearance required by government regulation and crashed into a mountain).

In rejecting KAL's motion for summary judgment, the district court concluded that the "evidence is capable of permissible inferences that would establish each and every necessary element of willful misconduct." 704 F.Supp. at 1173. The court found that the jury was entitled to conclude "that the crew was off-course at the required checkpoints and that the crew therefore must have known of their deviation at such points . . . , " and that "there is sufficient evidence for a conclusion that the KE 007 crew knew that their INS system was unreliable . . ." *Id.* at 1139 n. 10, 1140. The district court also denied KAL's post-trial motion.

Then the Court of Appeals reviewed the proof of KAL 7's course deviation and held "[t]here was sufficient evidence here from which to decipher a pattern of conduct giving rise to liability." 932 F.2d at 1481; Cross-Pet. at 10-11a. The court observed that the evidence demonstrated "KAL's inability to suggest any innocent explanation for the disaster." 932 F.2d at 1481; Cross-Pet. at 10a.

CONCLUSION

The cross-petition for writ of certiorari should be denied.

Respectfully submitted,

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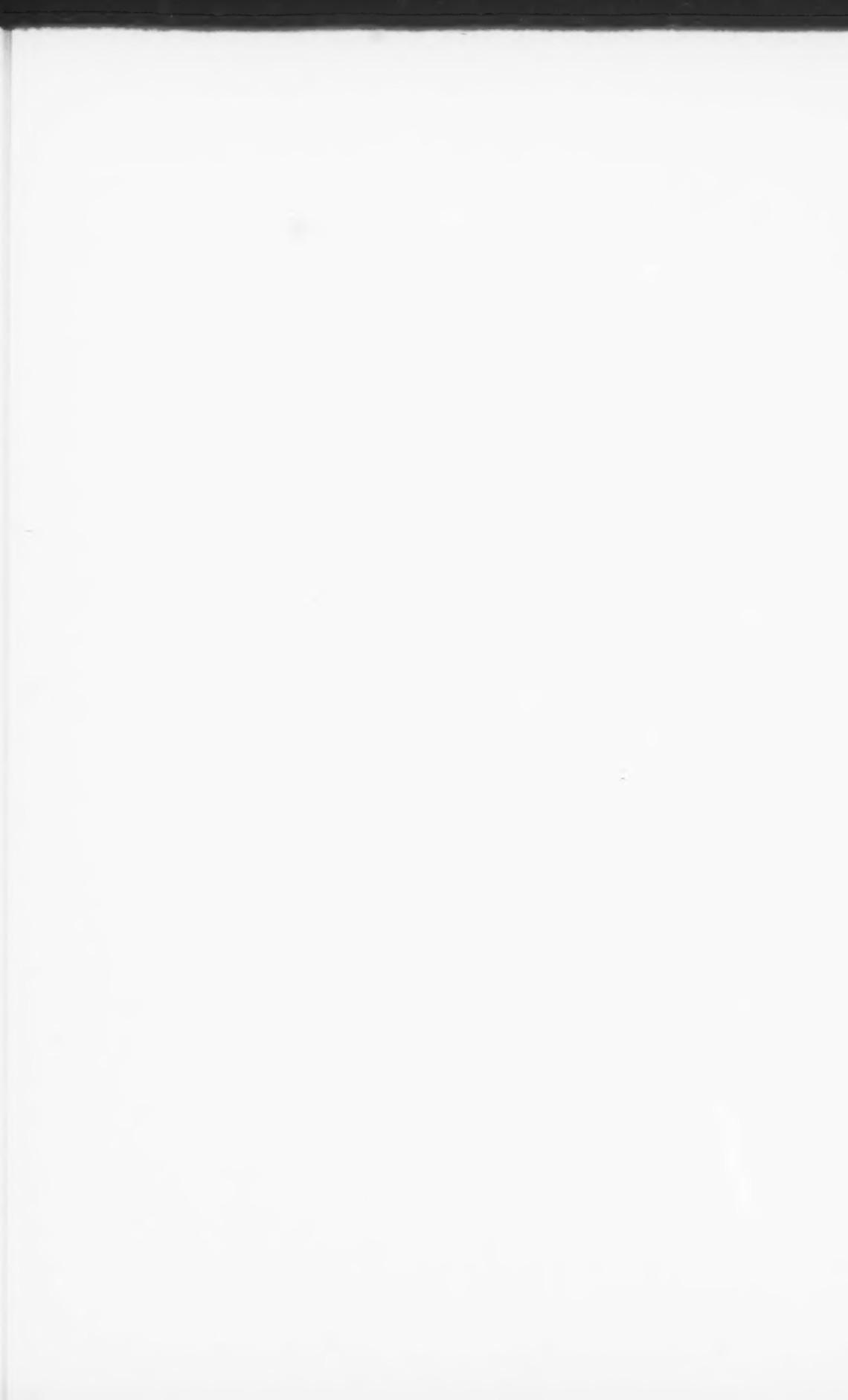
October 30, 1991

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MDL 565/Misc. 83-345
Washington, D.C., July 19, 1989, 9:35 a.m.

IN RE: KOREAN AIR LINES
DISASTER OF SEPTEMBER 1, 1983

VOLUME 3

TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE CHIEF JUDGE
AUBREY E. ROBINSON, JR.
UNITED STATES DISTRICT JUDGE, AND A JURY

APPEARANCES:

For the Plaintiffs:	DONALD MADOLE, ESQ. MILTON SINCOFF, ESQ. GEORGE FARRELL, ESQ. STEVEN R. POUNIAN, ESQ.
For the Defendant:	GEORGE N. TOMPKINS, ESQ. MARSHALL TURNER, ESQ. DESMOND BARRY, ESQ.
Court Recorder:	Mary Thomas
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Proceedings recorded by electronic and sound recording,
transcript produced by transcription service.

[305] * * *

Q Do you have an opinion as to whether the co-pilot—withdrawn. If the equipment, the INS equipment was not working properly during the flight, what was the required procedure that was to be followed by the Korean Air Lines flight crew?

A The correct procedure would be return to Anchorage.

Q Before returning to Anchorage, would they have to make any radio communications?

A Yes. They would have to notify the airway traffic control system; they would have to dump fuel, and return to Anchorage.

Q So, they would have to get permission from Air Traffic Control?

A Yes, sir, indeed.

Q But in order to do that, they have to radio that, they have to radio that they have a problem?

A Yes.

* * * * *

[313] * * *

Q What was the crew of flight 7 supposed to do under the existing Korean Air Lines procedures in the event the INS systems or system malfunctioned during the flight of the plane after takeoff from Anchorage?

A They were to return to Anchorage.

Q Were they supposed to radio the information?

THE COURT: He has answered that question. Yes. You got it from him before.

MR. SINCOFF: Okay.

BY MR. SINCOFF:

Q Now, did this crew at any time report to Air Traffic Control that they were having a navigation problem?

A No.

Q Did they report to Air Traffic Control by radio or to Korean flight 15 crew that their INS system was not working properly?

[314] A No.

Q Do you have an opinion as to whether or not the crew under existing Korean Air Lines operating procedures was permitted to go beyond Bethel, given its position in relation to Bethel?

A No, I don't believe they were. No, sir.

Q Why?

A Their—Bethel is the gateway. This is a good check on whether your navigation system was working or not working; and if wasn't working, now they are going into a trans-oceanic area where it is absolutely required. It is a firm requirement that you have operating INS's.

So, their obligation was to dump their fuel and get an air-way traffic control clearance—tell them they were having navigation problems and return to Anchorage on the ground and try to get the INS fixed.

* * * * *

[356] * * *

Q Now, was there an absolute requirement at that time for the airplane to pass directly over Bethel?

A Yes, sir. there was.

Q Was that required of all aircraft that were going to fly R-20—

A Yes, sir.

Q —and flight 15 did have that same clearance, correct?

A Yes, sir.

Q And flight 15 did fly over Bethel, is that not right?

A Right. That is what it shows. Yes, sir.

Q So, as to properly check the navigation instruments.

A Correct. Not only that, but I might add to follow accurately, the earlier traffic control clearance.

* * * * *

[369] * * *

Q Now then, if you will, going to what you consider to be the most probable flight path, I would like you to tell the Court and the jury about the clues that were available to the crew of flight 7 through use of weather radar and through use of their other equipment as you go past NABIE.

A Well, if you went by NABIE and were unable to get the DME or unable to contact Anchorage center on your VHF, that would certainly be a pretty strong clue that there was [370] something amiss. As far as the radar goes, if you look here, he would see this St. Matthews Island. He would have flown right over the tip of it, completely misplaced from where it would have been if he had been on the R-20. He would have also seen this island up here as he progressed along.

Q What was the range of the weather radar?

A 180 miles, and this—these circles here, you can kind of eyeball them. They are about 180 miles, about 175 I believe these are.

THE COURT: What do you mean by eyeball?

THE WITNESS: I beg your pardon, sir?

THE COURT: What do you mean by eyeball? Explain.

THE WITNESS: Well, I am just explaining to them how they can judge from the position of the airplane without me taking this off and moving it around, how they can see—get an idea of what 180 miles range is.

BY MR. MADOLE:

Q Are you saying, sir, that as that airplane crossed the North Pacific on what you consider to be the probable flight path, that there was always this kind of radar coverage surrounding that airplane if the crew was using it?

A Yes. Nothing would fit.

* * * * *

[487] * * *

Q Now sir, you have the crew ignoring all those warnings; flying out to Bethel and getting to Bethel. Do you think the crew should have known at Bethel that they were operating on a bad INS?

A Yes. And I believe they did know.

Q Is there any way they didn't know?

A I can't imagine any way that they couldn't know that they were in trouble. That they were on the wrong course, and that they had a misprogrammed INS. They had to know.

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MDL 565/Misc. 83-345
Washington, D.C., July 25, 1989, 9:40 a.m.

IN RE: KOREAN AIR LINES
DISASTER OF SEPTEMBER 1, 1983

VOLUME 7

TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE CHIEF JUDGE
AUBREY E. ROBINSON, JR.
UNITED STATES DISTRICT JUDGE, AND A JURY

APPEARANCES:

For the Plaintiffs:

DONALD MADOLE, ESQ.
MILTON SINCOFF, ESQ.
GEORGE FARRELL, ESQ.
STEVEN R. POUNIAN, ESQ.

For the Defendant:

GEORGE N. TOMPKINS, ESQ.
MARSHALL TURNER, ESQ.
DESMOND BARRY, ESQ.

Court Recorder:

Mary Thomas

Transcription Service:

Deposition Services, Inc.
600 East Jefferson Street
Suite 103
Rockville, MD 20852
(301) 738-1042

Proceedings recorded by electronic and sound recording,
transcript produced by transcription service.

[899] * * *

Q Now, do you have an opinion in this case with regard to the Korean Air Lines Flight 007 as to what occurred with regard to programming the INS?

A Yes, I believe that most likely that two or three of their INS systems were misprogrammed while they were at the gate in Anchorage.

Q Could you tell us the reasons you have for saying that?

A Well, there are several reasons beginning with the radar that showed that after they had taken off and their direct at Bethel and their flight track did not coincide with a flight track that should have taken them on a course direct to Bethel. Instead, it was continually diverging from course.

* * * *

[904] * * *

Q Did you form any conclusion as to where flight 7 passed in relation to Bethel that night?

A The radar information doesn't extend completely out to the Bethel VOR, but again, as I mentioned, when we're flying an airplane, we're looking for consistency, and by extending these lines out here, from this point, it would have been virtually impossible for the airplane to have turned and gone over the VOR and then back out on course without showing up on radar again. It's just too tight of a turn.

Q So then where do you say flight 7 passed in relation to Bethel that night?

A I've measured it previously, and it was very close to 12 miles north of Bethel.

Q Where was flight 7 supposed to fly in relation to Bethel that night under KAL procedures?

A Well, under KAL procedures and under all procedures, the airplane is required to fly directly over Bethel in order to verify that the INS is properly working.

* * * * *

[1906] * * *

The difference with the airplane is that when you're on course, you're supposed to be going down a white line or the yellow line, but so that line that is presented to the pilots is as a result of a radio signal, navigation signal, being sent up from the station on the ground to the airplane, and the receivers in the airplane, they measure this signal and then they tell you whether you're going to it or whether you're going to the side of it.

Q Do you have an opinion as to whether the Korean Air Lines flight crew, the captain and the co-pilot, knew they were passing to the north of Bethel by approximately 12 miles?

A Well, unless they had their eyes closed, they absolutely knew that they were passing to the right of Bethel.

Q Under Korean Air Lines safety procedures existing that night, was there an allowable distance that was permitted to pass over Bethel in relation to Bethel but not directly over? Was there some margin for error that was allowed?

A Yes, it's two miles and one hour which is the same tolerance for the INS, so that if the INS doesn't take you within at least two miles of the station in one hour, then it's beyond its tolerance, and it's not supposed to be used. * * *

[1915] * * * So, the only way that he would know how to get direct to Bethel would be to use the INS. So it is reasonable to assume that at that time, he put the INS on to go direct to Bethel.

Q Do you have an opinion as to whether thereafter, before getting into the vicinity of Bethel, whether he turned his INS off?

A Yes. The radar track, as I'd mentioned earlier, should be a nice, smooth, straight line—even if it was misprogrammed and taking the airplane north of Bethel, it should still be a nice smooth line. But instead, there are three or four places here where the line is straight for about three or four radar hits, and then it goes crooked again so it is not nice and smooth like is the track of flight 15.

That looks to me like they were doing something—putting the INS on to fly the airplane direct to Bethel, but it was not taking them direct to Bethel. So then they took it off and made a turn, a correction to course, manually back toward Bethel; put it on again, and again the flight line straightens out but it's still not pointing at Bethel like it should.

This happens three or four times before the [916] airplane gets to Bethel or gets by Bethel. So I think at that point when it is obvious that they were not using even the misprogrammed INS to proceed direct to where it thought Bethel was, but that they knew then that there was something wrong with that INS that was misprogrammed.

Q Now, using those two exhibits in front of you, when do you say the plane last went on INS and stayed on INS with autopilot?

A Well, just using this pointer as an example, the line is a little crooked, but you can see from right about in there, all of these are pretty much in a straight line—these last four of five radar plots—which show that it indicates to me that at that point someplace right in here or right in here, the captain and the crew of flight 7 had decided that they were going to use that misprogrammed INS and continue their flight to Seoul.

* * * *

[928] * * *

Q Now, you have told us about the—withdraw the question. What was required of the KAL 7 flight crew before they passed a beam of Bethel under the existing Korean Air Lines safety rules and good pilot practices as of that time?

A Well, if their navigation equipment couldn't be determined that it was accurate by flying over Bethel, if it was 12 miles off in one hour, then if you project that down [929] the road, that's going to put them way off track, and if they couldn't correct the situation, they were required at Bethel to turn around—first of all to notify air traffic control that they weren't sure of their course or that they were off-course and get a clearance to turn around and go back because, obvi-

ously, they couldn't turn right around and go back without a clearance because flight 15 was right behind them.

So they would have had to get an air traffic control clearance and then return back to Anchorage and fix the problem on the ground.

Q Were there written procedures in effect at that time which spelled out the requirement to notify air traffic control?

A Yes.

Q If you had a navigation problem?

A Yes.

Q Where were they set forth?

A They're set forth in the ICAO appendix dealing with air traffic control, also in Federal air regulations and also right on the chart that they were using, the Jeppesen chart, Exhibit 61.

* * * * *

[931] * * *

Q Now, you know from the transcript—withdrawn. Did you examine the transcripts of radio conversations between the crew of flight 7 and the air traffic controllers at Anchorage?

A Yes, I did.

Q And did you find a report by flight 7 with relation to Bethel?

A They reported that they were, I think, in pilot's parlance, I could look it up exactly, but generally, as I remember, they said, Bethel at such and such a time, which would indicate that they were telling ATC that they were over Bethel at that time.

Q Was that report in your opinion accurate?

A I—no. It was not accurate.

Q Why?

A Because they knew—unless they were all asleep, and they could not have been asleep if they were talking on the radio, so they—and therefore, they, by looking at their instruments, their INS, the distance measuring equipment,

and the radio beacon VOR, they had to know that they were not over Bethel.

* * * * *

[940] * * *

BY MR. SINCOFF:

Q The question is, "Do you have an opinion?" Just you answer first, yes or no. Do you have an opinion as to whether the crew of flight 7 knew or should have known they were off-course, as their plane was approaching the position where they reported they were at NABIE to flight 15 for flight 15 to relay to traffic control? Do you have an opinion, yes or no?

A Yes.

Q What is your opinion?

A My opinion is that it had to be very obvious to the crew that they were not on R-20. They had airborne weather [941] radar that would have been showing St. Matthews Island, and I think that the radar was discussed before. It has a light beam ground mapping capability, so that it would show the contour of land masses and islands, things like that; as well as any weather that might be in the way; and they also—the fact that they did have to relay the report through flight 15 should have raised a lot of suspicion that they were out of range of the radio.

Since they couldn't talk to air traffic control, they also could not receive the distance measuring distance that is supposed to tell them how far off-course they are. The DME is in the same frequency band as the VHF radio that they communicate with; and so if they were out of range of the radio communications, they wouldn't receive the distance either.

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MDL 565/Misc. 83-345
Washington, D.C., July 26, 1989, 9:38 a.m.

IN RE: KOREAN AIR LINES
DISASTER OF SEPTEMBER 1, 1983

VOLUME 8

TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE CHIEF JUDGE
AUBREY E. ROBINSON, JR.
UNITED STATES DISTRICT JUDGE, AND A JURY

-APPEARANCES:

For the Plaintiffs:	DONALD MADOLE, ESQ. MILTON SINCOFF, ESQ. GEORGE FARRELL, ESQ. STEVEN R. POUNIAN, ESQ.
For the Defendant:	GEORGE N. TOMPKINS, ESQ. MARSHALL TURNER, ESQ. DESMOND BARRY, ESQ.
Court Recorder:	Mary Thomas
Transcription Service:	Deposition Services, Inc. 600 East Jefferson Street Suite 103 Rockville, MD 20852 (301) 738-1042

Proceedings recorded by electronic and sound recording,
transcript produced by transcription service.

[1050] * * *

Q Well, sir, in your scenario, all of the INS's are incorrectly programmed, both HSI's would say it is 600 miles to Bethel, would they not?

A They would.

Q This crew has been on R-20 coming out of Anchorage forty, fifty times. Is that your recollection?

A That's my recollection.

Q They should certainly know that Bethel is not 600 miles away from Anchorage, should they not?

A I think at that point in time, that is exactly what they know.

Q Okay. So, you think it is at that point that they learn, either in Houston's scenario—one—or in your [1051] scenario—with all three—that is when they learn that their INS's were incorrectly programmed, be it one or three. Is that correct?

A Somewhere in that vicinity. Yes.

Q You do not think they picked it up on the ground, but they picked it up when they got in the air. If they had noticed that when they were being pushed back and starting their engines while they were still on the ground, how long would it have taken them to reprogram their INS's?

A About fifteen minutes.

Q That is it?

A Yes, sir.

Q Basically, you just start all over again?

A Yes. You turn them off or back to stand by. Put in the positions again, and start over.

Q Now, as I recall your testimony yesterday, sir, it was your opinion that along the way from Anchorage from Bethel, the crew turned off the autopilot from being commanded by the INS's. Is that correct?

A That's correct.

Q And that was when the crew realized that their INS's were incorrectly programmed?

A That's my opinion, yes.

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MDL 565/Misc. 83-345
Washington, D.C., August 1, 1989, 9:41 a.m.

IN RE: KOREAN AIR LINES
DISASTER OF SEPTEMBER 1, 1983

VOLUME 12

TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE CHIEF JUDGE
AUBREY E. ROBINSON, JR.
UNITED STATES DISTRICT JUDGE, AND A JURY

APPEARANCES:

For the Plaintiffs:	DONALD MADOLE, ESQ. MILTON SINCOFF, ESQ. GEORGE FARRELL, ESQ. STEVEN R. POUNIAN, ESQ.
For the Defendant:	GEORGE N. TOMPKINS, ESQ. MARSHALL TURNER, ESQ. DESMOND BARRY, ESQ.
Court Recorder:	Mary Thomas
Transcription Service:	Deposition Services, Inc. 600 East Jefferson Street Suite 103 Rockville, MD 20852 (301) 738-1042

Proceedings recorded by electronic and sound recording,
transcript produced by transcription service.

[1593] * * *

Do you know how long it was supposed to take them to go from NIPPI to NOKKA? One hour and 20 minutes. So he is 15 minutes short of getting to that place. Physically impossible.

His ground speed, as you will from this chart, was 500 miles an hour, nautical miles an hour. How did he go 660 miles in one hour and five minutes? Physically impossible.

Let's believe a Korean Air Lines attorney. Here is why that would be willful misconduct, and remember, that measurement of 660 miles is a straight line—no turns, no change in altitude, no change in winds, everything is fine, they don't even have to turn over here.

There would be turn turns. If the plane went here, it had to first turn right, and then he would have to go up here and turn left in order to go in that heading.

So let's assume what Korean Air Lines tells you is true: that is what happened. The plane was here. He turned right. He goes over the Kurile Islands.

He goes across this line over the Kurile Islands. The first clue is the crew has to look at their weather radar. If he was flying from NIPPI to NOKKA, the weather radar would show the Kurile Islands would be to the right.

Now all of a sudden the plane goes to the right, [1594] crosses the Kurile Islands, so they are suddenly below the plane, and then when he passes the Kurile Islands, they are to his left.

The airborne radar would tell the crew something happened, you are off course, go back. Now according to them, the INSs are all working, they are not misprogrammed, everything is fine at NIPPI.

The INSs, the instruments, everything would tell them during this hour's flight that you are going in the wrong direction.

They have three compasses. The compasses alone would tell them they were off course. The INS would tell them they were off course, the RMI.

I mean, you cannot believe that, but if you do, it is willful misconduct. Why? They didn't discuss with you NYTIM, and

you haven't heard too much about it in the trial, but all you have heard about mostly is the reporting points, which are the black diamonds, but there was some testimony about the white diamonds.

The white diamonds are also waypoints, and at each waypoint, even though you don't have to report by radio, you have got to go through using the INS, you have got to check it, you have got to push the button, you have got to determine your present position, you have got to check distance to go, time to go, cross-check error.

[1595] So it all three INSs were working after 30 minutes of flight, coming up on what they think is NYTIM, that is half-way. Then they would know they have flown off course. They would have confirmed it, and they would have been required to hang a louie—hang a louie—turn left, go back, tell Traffic Control I'm off course, something happened, I don't know what, but I'm off course, get me out of here, call the Russians, tell them.

That never happened, couldn't have happened. If it did happen, willful misconduct, because the crew would have known and had to know during that hour, flying from NIPPI to the crash site, to the interception, the plane was off course, that he would have had to know, never happened.

* * * * *

[67] * * *

Q. Mr. Nelson, we met earlier. I'm Desmond Barry. I represent Korean Air Lines.

Is it correct, sir, that you had no involvement in the preparation of Exhibit 198, which is the final report by ICAO on this incident?

MR. BARRY: Want to show him one so he knows?

(A pause in the proceedings.)

MS. VON FLATERN: He's referring to this (indicating).

A. Um—I want to be completely accurate in my memory. I said that I did have an advance [68] copy of the document

that was being printed, and I believe I did make some comments, probably to Mr. Freer or the secretary-general, one of the two, about the choice of words and how a detail might have been explained in a part of the report.

Q. And those comments were based upon your reading of the advance copy of Exhibit 198; is that correct?

A. Yes.

Q. And do you know whether or not any of your comments, as you gave them to Mr. Freer, were incorporated in the final report?

A. I believe they might have been—they might have made use of one of my comments, and I didn't tell them how to write it. But I think they did exercise some caution and adjust—not adjust, but use some care in choosing the words on the subject—

Q. Do you—recall—I'm sorry—

A. —on the subject that I mentioned to you.

* * * * *

[78] * * *

Q. In an answer to an earlier question from Mr. Madole relating to paragraph 04.4.07.5 of Exhibit 288, you stated—

MS. VON FLATERN: I'm sorry, Des, which paragraph?

MR. BARRY: 04.4.07.5, first sentence.

A. You stated that based upon the information that was presented to you, you agreed that the aircraft had a significant deviation from track; is that right?

A. Yes.

Q. Now, my question is, what information or what evidence did you have that this aircraft deviated from its track?

A. Well, by that time, there was evidence being recovered of bits and pieces of the aircraft from salvaged parts that were washing ashore on the coast, I think, of Japan. So there was pretty good evidence that the aircraft did go down in this area off of Sakhalin, and that the vicinity—and that correlated with the report of a radar [79] observation of an aircraft that disappeared off the screen about the time 007 might

have been going by; and so there was reason to believe that the aircraft did go down in the vicinity suggested here in this report off of Sakhalin island, which, that area is about 400 miles north of the flight path that it should have been on.

Q. Now, what radar observation are you speaking about?

A. I'm talking about the one referred to in this report which was a Japanese radar at Wakkanai.

* * * * *

